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July 16, 2007

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 "F" Street, NE
Washington, DC 20549-1090

Re: **Proposed Changes to NASD By-Laws: File No. SR-NASD-2007-023**

Dear Ms. Morris:

I submit this letter in regard to (i) the proposed changes to the by-laws (the "By-Laws") of National Association of Securities Dealers, Inc. ("NASD"), a Delaware membership corporation, which were submitted to NASD's members ("Members") through a proxy statement dated December 14, 2006 and (ii) the proposed $35,000 payment (the "Member Payment") that will be made to the Members which will be paid in conjunction with the proposed consolidation (the "Proposed Transaction") of NASD's regulatory activities with those of NYSE Regulation, Inc. The proposed changes to the By-Laws are a precondition of the Proposed Transaction's closing, and the Member Payment would be made in connection with the closing.

The proposed changes to the By-Laws have been approved by NASD's board of directors (the "Board") and by (and approved by an overwhelming majority of) the Members at the special meeting of Members held on January 19, 2007 (the "Special Meeting"). The proposed changes to the By-Laws have been submitted to the Securities and Exchange Commission (the "SEC") for its approval.

I understand that Article IV of the Restated Certificate of Incorporation of NASD ("Certificate") provides that members have no voting rights except as provided by the General Corporation Law of the State of Delaware ("DGCL") or the Certificate, and that Members shall be entitled to amend the NASD By-Laws. I also understand that Article XVI of the By-Laws establishes a procedure whereby Members are sent copies of proposed amendments to the By-Laws, and if the proposed amendments are approved by a majority of the Members voting within

thirty (30) days and, thereafter, approved by the SEC, the proposed amendments become effective.[1]

In the course of the SEC's review, questions have been raised concerning (i) whether it is within the authority of the Members to approve proposed amendments to the By-Laws, as done here, at a special meeting held more than thirty days after the proposed By-Laws had been submitted to the Members and (ii) whether a larger Member Payment would be permitted under Delaware law. For the reasons and subject to the assumptions and limitations set forth below, it is my view that (i) the Members' vote at the Special Meeting approving the proposed amendments to the By-Laws was a valid exercise of the Members' franchise rights and authorized by Delaware law and (ii) a larger Member Payment would not be permitted under Delaware law.

Approval by Members of Proposed Changes to By-Laws

Section 211(a) of the DGCL provides that "meetings of stockholders may be held at such place ... as may be designated by or in the manner provided in the certificate of incorporation or bylaws ...." 8 *Del. C.* § 211(a); *see also id.* § 215(a) (providing that Section 211(a) applies to membership corporations notwithstanding its use of "stockholders" rather than "members"). Because Section 211(a) speaks broadly to "meetings" without any limitation, it encompasses both "annual meetings" and "special meetings." *Compare* 8 *Del. C.* § 211(a) (using "meetings" without limitation), *with* 8 *Del. C.* § 211(c) (controlling "annual meetings," as opposed to "meetings"), *with* 8 *Del. C.* § 211(d) (controlling "special meetings," as opposed to "meetings"). Thus, Section 211(a) plainly applies to all NASD meetings.

On January 19, 2007 NASD held a meeting of its Members. That meeting was called under the authority of Article XXI, Section 2 of the By-Laws.[2] It was properly noticed, and the requisite quorum was in attendance. At that meeting, the Members voted to amend the By-Laws. The power of stockholders or members to modify the by-laws of a Delaware corporation is plenary. Section 109(a) of the DGCL states:

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[1] By-Laws of National Association of Securities Dealers, Inc. art. XVI, § 1 available at http://nasd.complinet.com/nasd/display/display.html?rbid=1189&element_id=1159000026 ("The Board, upon adoption of any such amendment to these By-Laws, except as to spelling or numbering corrections or as otherwise provided in these By-Laws, shall forthwith cause a copy to be sent to and voted upon by each member of the NASD. If such amendment to these By-Laws is approved by a majority of the members voting within 30 days after the date of submission to the membership, and is approved by the Commission as provided in the Act, it shall become effective as of such date as the Board may prescribe.").

[2] *See* By-Laws, *supra* note 1, art. XXI, § 2 ("A special meeting shall be on such date and at such place as the Board shall designate. Only such business shall be conducted at a special meeting as shall have been brought before the meeting pursuant to [notice] ....").

> [T]he power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote, or, in the case of a nonstock corporation, in its members entitled to vote; provided, however, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body by whatever name designated. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.

8 *Del. C.* § 109(a) (emphasis added). Section 109(a) is a mandatory provision of the DGCL. Thus the power to amend the By-Laws is conferred on the Members.

Because the Members may meet, as they could on January 19, 2007 per Section 211 of the DGCL, and because those Members have the power to amend the By-Laws, as the NASD Members do per Section 109, then it follows that at that meeting the Members' vote to modify the By-Laws was a valid expression of power expressly conferred by the DGCL. Moreover, under Delaware law that mandatory power of Members to amend the By-Laws cannot be limited by any charter provision, much less by any mere by-law. If a corporate by-law purports to nullify a mandatory provision of the DGCL, then, as a matter of Delaware law, it is void in this respect. *See generally SEC v. Transamerica Corp.*, 163 F.2d 511 (3d Cir. 1947) (holding that a by-law precluding stockholder action at a duly noticed meeting would be void under Delaware law).

Moreover, there is nothing to suggest that Article XVI was intended to be the exclusive method by which Members modify the By-Laws. There is no language in Article XVI purporting to be the express means by which Members might amend the By-Laws. There is no language in Article XVI purporting to limit Members' powers to take any action at any meeting, special meeting or annual meeting, or by consent. Such language would have been easy to include, but it was not included. Moreover, such an interpretation would undermine the very purpose of meetings under Delaware law. Under Delaware law, a meeting is much more than a place of debate whereby information and points of view are exchanged; rather, a meeting is the place where the members' voice is actually heard and there the members' power to control the corporation's destiny is exercised. *See, e.g., Perlegos v. Atmel Corp.* C.A. No. 2320-VCN, 2007 WL 475453 (Del. Ch. Feb. 8, 2007) ("Along with the [stockholder's] right to vote, the forum in which shareholders exercise this right plays a fundamentally important role in the corporate governance structure established under the DGCL. In short, a stockholders meeting is an important event on the corporate calendar.") (emphasis added); *see also* 5 Wm. Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 1996, at 4 (rev. ed. 2003) ("[M]eetings of the shareholders or members are the sole and necessary regular modes of choosing corporate officers and determining fundamental questions that are beyond the competency of directors or officers.").

The better view, in my opinion, is that Article XVI is not the exclusive means by which the By-Laws might be amended. In these circumstances, the power of Members to act at a meeting is left intact and the January 19, 2007 vote was valid and takes effect. Delaware law clearly favors this view, which leaves intact the January 19, 2007 vote, supported by an overwhelming majority of the Members. Essentially, this view provides Members with multiple means by which to participate in corporate governance. In other words, this view furthers the ends of corporate democracy. *See Openwave System Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, C.A. No. 2690-VCL, 2007 WL 704943, at *2 (Del. Ch. Mar. 5, 2007) ("This court and Delaware law are especially solicitous of the franchise rights of stockholders ...."); *Openwave System Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, C.A. No. 2690-VCL, 2007 WL 1500034, at *8 (Del. Ch. May 18, 2007) ("If the language [within a corporate by-law] is found to be ambiguous doubt is resolved in favor of the stockholders' electoral rights."); *see also Hoschett v. TSI Int'l Software, Ltd.*, 683 A.2d 43, 44 (Del. Ch. 1996) (Allen, C.) (noting "[t]he critical importance of shareholder voting both to the theory and to the reality of corporate governance"). Moreover, Delaware courts, as courts in every jurisdiction, have indicated time and again that by-laws (and other legal instruments) should be interpreted in a manner consistent with the DGCL. *See, e.g., Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985) ("[T]he courts will construe the bylaws in a manner consistent with the law rather than strike down the bylaws. A bylaw that is inconsistent with any statute or rule of common law, however, is void ....") (citing Fletcher, *supra*, §§ 4184-85 (rev. ed. 1982)). Indeed, in my view, By-Law amendments approved, as here, pursuant to a Section 109(a) member vote at a meeting have independent legal significance (once approved by the SEC), and their validity is not tested by the strictures of the By-Law amendment process that arises by operation of Article XVI or, for that matter, by the process for member action by consent under DGCL Section 228. *See generally Orzeck v. Englehart*, 195 A.2d 375, 376-77 (Del. 1963) ("The mere fact that the result of actions taken under one section may be the same as the result of action taken under another section does not require that the legality of the result must be tested by the requirements of the second section."). This is a core principle, if not the core principle, of Delaware corporation law.

Amount of Member Payment

Next, with respect to whether a larger Member Payment could have been made by NASD, a membership non-profit corporation organized in the State of Delaware,[3] one must first consider Article 4 of the Certificate, which states:

> NASD shall be a membership corporation and shall have no capital stock. NASD is not organized and shall not be conducted for profit, and no part of its net

[3] *See* Restated Certificate of Incorporation of NASD, Inc. (filed with Delaware Secretary of State on Feb. 2, 2005).

> revenues or earnings shall inure to the benefit of any individual, subscriber, contributor, or member.[4]

In defining NASD's powers in this regard, Article 4's chosen language tracks that of the federal income tax code (the "Code"). *See, e.g.*, 26 U.S.C. § 501(c)(6) ("The following organizations are [exempt from taxation]: Business leagues ... [and] boards of trade, not organized for profit [where] no part of the net earnings of which inures to the benefit of any private shareholder or individual."); *see also, e.g.*, Tariff Act of 1909, ch. 6, § 38, 36 Stat. 112. Thus, any violation of the Code would violate the Certificate.

The DGCL is an enabling statute that affords Delaware corporations the ability to engage in a wide array of actions, if the corporation opts into this framework in its certificate of incorporation. *See* 8 Del. C. § 102(a)(3) ("It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity ...."). However, such authority can be limited by the corporation's certificate of incorporation. In this respect, Delaware courts have repeatedly held that a Delaware corporation does not have the authority to engage in activities prohibited by its certificate of incorporation.[5]

I understand that there would have been a serious risk of violating the Code's prohibition against private inurement if a larger Member Payment were made. Any action in contravention of the Code's prohibition against inurement would also be in contravention of the prohibition against inurement set forth in the Certificate. Any such action would, therefore, be void under Delaware law.

Conclusions

Based upon and subject to the foregoing, and subject to the limitations stated below, I conclude that (i) the January 19, 2007 Member vote approving the proposed By-Law amendments was a valid exercise of the Members' franchise rights and authorized by Delaware law and (ii) because the Certificate contains a prohibition against inurement, if a payment by NASD in excess of the contemplated Member Payment would violate the Code's prohibition against inurement, any such payment also would be void under Delaware law.

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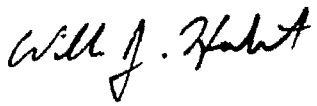
[4] *Id.* art. 4.

[5] *See, e.g., Lions Gate Entm't Corp. v. Image Entm't Inc.*, C.A. No. 2011-N, 2006 WL 1668051, at *7 (Del. Ch. June 5, 2006) (holding that by-law provision in excess of authority conferred by charter "is invalid, *ultra vires*, and void."); *Solomon v. Armstrong*, 747 A.2d 1098, 1114 n.45 (Del. Ch. 1999) (describing "ultra vires" acts as those "acts specifically prohibited by the corporation's charter, for which no implicit authority may be rationally surmised"); *see also, e.g.*, Black's Law Dictionary (7th ed. 1999) (defining "ultra vires" as "unauthorized: beyond the scope of power allowed or granted by a corporate charter").

In the event that you or your SEC colleagues have any questions with respect to this letter, do not hesitate to contact me at (302) 651-7559. I understand that you or your SEC colleagues may make this letter public in connection with the matters addressed herein and I consent to your doing so. However, this letter may not be relied upon by any other person or entity for any purpose without prior written consent from Richards, Layton & Finger, P.A.

Sincerely,



William J. Haubert

cc: Seth Barrett Tillman